IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

Date of Decision: 9-11-1995.

Criminal Appeal No. 328 of 1990

For Approval and Signature:

THE HON'BLE MR. JUSTICE A.N. DIVECHA

And

THE HON'BLE MR. JUSTICE H.R. SHELAT.

1. Whether Reporters of Local Papers may be allowed to see the Judgment ?

2. To be referred to the Reporter or not ?

3. Whether Their Lordships wish to see the fair copy of Judgment ?

4. Whether this case involves substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5. Whether it is to be circulated to the Civil Judge?

Shri M.J. Budhbhatti, Advocate for the appellant.
Shri S.R. Divetia, Additional Public Prosecutor for the respondent State.

Coram: A.N. Divecha,J. & H.R. Shelat,J.
(9-11-1995)

ORAL JUDGMENT: (Per: H.R. Shelat, J.)

1. The appellant, being aggrieved by the judgment and order dated 31-1-1990 convicting him of the offences under Section 302 and Section 436 of the Indian Penal Code; and sentencing him to life imprisonment together with fine of Rs.500/- in default, simple imprisonment of 6 months with regard to the offence under Section 302 of the Indian Penal Code; and 10 years simple imprisonment with fine of Rs.500/- in default, simple imprisonment of 6 months more of the offence under Section 436, Indian Penal Code by the then learned Additional Sessions Judge, Mehsana, has preferred this appeal.

2. Husenbhai Amubhai was residing at Agol in Kadi Taluka of Mehsana District. Rahemanbhai Husenbhai and Noormohammed Husenbhai are his sons. He was having agricultural land. He and his sons were residing together, but for the agricultural operations in the field he used to stay overnight in the shanty erected there. On 12th August 1988 Husenbhai Amubhai had gone go his field and was required to stay overnight there because of the agricultural operations. After the day's work was over he took supper and went to bed. At 4.00 a.m. he was fast asleep, but suddenly painful torridity made him to wake up. He was aghasted to note that the shanty was on fire which was a catastrophe. He was perdued owing to besetting violent flames about to incinerate the shanty. He sustained burns/injuries. He shouted for help. Few of the neighbouring land owners rushed to the scene and Husenbhai who was seriously injured was taken to Bhagyodaya Hospital for treatment. He before the Doctor and the police officer stated who caused the shanty to burn. He named his son-the appellant, and then died during the course of the treatment. A complaint was lodged. After the investigation was over, the charge-sheet against the appellant was presented before the Court of the Judicial Magistrate, First Class at Kadi. The learned Magistrate committed the case for trial to the Sessions Court at Mehsana which came to be numbered as Sessions Case No. 54/89. The case was then assigned to the then learned Additional Sessions Judge who recorded the plea and as the appellant pleaded not guilty, the prosecution adduced necessary evidence. Considering the materials on record, the learned Additional Sessions Judge passed the order and convicted the appellant as stated hereinabove. Being aggrieved by the judgment and order passed by the lower Court, the present appeal has been preferred before us.

3. Mr.M.J. Budhbhatti, learned Advocate appearing on behalf of the appellant submitted that without any evidence appellant was convicted. Required evidence as per law was wanting. The learned Judge misconstrued the evidence, and committed the error while reaching to the conclusion . The lower court out of fancy, convicted the appellant. The learned Judge mainly relied upon the statement made by the deceased before the Doctor but credibility of the same was doubtful. Mr. Divetia, the learned Additional Public Prosecutor urged to chastise as it was the case of patricide and the statement made by deceased was rightly relied upon.

4. We find force in the submission made on behalf of the appellant. Here, in this case two statements are made, one before the police officer and the another before the Doctor. We will first deal with the statement made before the police. That statement is produced at Exh.31. It may be stated at this stage that dying declaration even if uncorroborated can be made the

base of the conviction; but before that is done, the conscience of the Court should be satisfied. The Court must appreciate the statements and evidence thereof with caution and strictness. If accordingly it is appreciated and the statement is found beyond doubt, true and having been made with free will, without any instigation, or bias or animosity and also found to have been made in the fit state of mind leaving no room to doubt, certainly Court can act upon it and convict the accused. In this case, therefore, we have to see whether the statement recorded by the police at Exh.31 satisfies the requirement of the law and our conscience. Any one would be shocked knowing about patricide,but without being influenced by any notion. We have to appreciate and conclude as per law.

5. No doubt, the Head Constable recording the statement of the deceased is examined at Exh.30 and has supported the statement made by the deceased, but on perusal, we find no justification to place any reliance. According to the Head Constable, at the bottom, the thumb impression of the deceased was taken but the possibility thereof is highly doubtful. Dr. Chaturbhai Savabhai Parmar, P.W.2 examined at Exh.16 has made it clear that both the hands of the deceased were affected by burns and that fact is also mentioned in the certificate Exh.20. Which portion of the hand was burnt is not elucidated by the prosecution, and therefore it must be assumed that the whole of the hands including the fingers were burnt. When that is the case, it is difficult to agree with the submission made on behalf of the State that the accused put up the thumb impression. When his thumb and fingers were also burnt it was not possible for him to put up his thumb impression. The statement with thumb impression therefore raises the doubt, benefit of which must go to the appellant. Further mouth oesophagus and pharynx of the deceased must have been choked up disturbing vocal cards, impairing the capacity to utter.

6. At 13.00 hours, the statement is alleged to have been recorded but the evidence of the Doctor discredits the truth of that statement. According to him at 11.30 Dexona injection was given which is ordinarily given for regaining consciousness. It would, therefore, be clear that upto 11.30 the deceased was not conscious. Thereafter, again at 10.30 p.m., Dexona and Adrenaline injections were administered for the purpose of regaining the consciousness. This would show that upto 10.30 p.m. the deceased was not conscious; and it is also not made clear by the prosecution whether or not even for few minutes the deceased remained in consciousness in between. In the absence of that evidence, it should be assumed that even upto 10.30 p.m. the deceased was not conscious and therefore it is difficult to agree with the prosecution that the deceased was conscious and able to make statement and did make the statement in the fit statement of mind. The materials on record on the contrary show

that the deceased was not in a position to make any statement. However, when the statement is brought on record volumes can be said against the truth of the prosecution case.

7. It is pertinent to note that, in order to establish fit state of mind the person recording the dying declaration must first consult the Doctor and have his opinion along with endorsement or certificate about fit state of mind which the Head Constable Hirsinh has for no just cause omitted to do. No reliance therefore can be placed on the alleged statement (Ex.31).

8. We now switch over to the statement alleged to have been made by the deceased before the Doctor orally. The same has been noted down on the case paper by the Doctor (Exh.19.) The Doctor has noted down that homicidal burns by his son Rahemanbhai while he was sleeping at his farm house and his son set fire to the farm house. In the Certificate, Exh.20, the Doctor has also mentioned that the burns were homicidal by his son Raheman (the appellant). Whether this statement of the deceased can be acted upon for determining the issue in question is the point posed before us and on that point both the learned Advocates representing the parties vehemently submitted, but we are not inclined to accept the submission of Mr.Divetia, the learned Additional Public Prosecutor representing the respondent. For the reasons stated hereinabove, we find that the deceased was not at all conscious for the purpose of making any statement. If at all at the initial stage when the deceased was admitted in the hospital made the alleged statement and the Doctor as appears from the evidence informed the police, certainly he would have also informed about the statement made, but nothing has been brought on the record from the record of the police station in support of the say of the Doctor. The Doctor has no doubt stated that the Bavlu police station recorded the statement of the deceased at 1.00 p.m., and therefore Mr. Divetia representing the respondent submitted that the deceased was conscious and was in a position to make the statement but the statement, on which Mr. Divetia relies upon, is highly doubtful for the reasons we just now stated hereinabove. The facts on record show that at that time also and upto 10.30 p.m., the deceased was not conscious. The notes made by nurse are produced at Exh.21. These notes show that at 11-00 a.m; 4-00 p.m; 8-00 p.m; and 10-00 p.m.,the deceased was conscious but the notes are not free from suspicion. The evidence of the Doctor (Exh.18) is shaky and does not inspire confidence. On perusal it is clear that the deceased was left to his fate assigning the task to the nurse. Whether the decision taken and drugs administered by the and nurse was right and imperative is a mystery, as the Doctor could not face grilling cross and hod to shrewdly indicate his inertia. It may be mentioned that, the Doctor has stated in his cross-examination that Compose and Fortvin were administered by the Nurse making it

clear that he was not knowing why the same were administered and when making it clear that immediately after both the injections are given the patient will soon become unconscious. Since he was in charge and giving treatment, he was supposed to know the medicines given and note improvement if any in the condition of the patient. It was his duty to continuously watch the condition of the patient and if necessary make the changes in the medicines and injections to be given, but he paid no attention and left every thing to the Nurse incompetent to take decision. He did not watch nurse's performance, verify record and sign which would go to show that he was not at all really attending and mechanically signed the papers, and later on went to the Court to depose so that the prosecution might get support. In the alternative, it is not made clear whether the deceased was in a position to speak or utter although conscious. Under the circumstances, both the statements, on which the prosecution places reliance, are highly doubtful and not credible. The learned Judge, in our opinion, therefore fell into error in placing the reliance thereon. When both the statements alleged to have been made by the deceased are kept aside, there is no evidence on record which would lead us to hold in favour of the prosecution. The prosecution, in view of the matter has, in our view, failed to establish the charge beyond reasonable doubt. On no other point submissions were made by either of the parties. The appeal, therefore, requires to be allowed and it is accordingly allowed. The Judgment and Order, convicting and sentencing the appellant for the offences under Section 302 and 436 of the Indian Penal Code, are hereby set aside. The appellant-accused be set at liberty if not required in any other matter. Fine if paid be refunded.

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